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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LAMONT TERRELL ARNOLD, Defendant and Appellant.	E069015 (Super.Ct.No. FSB1501232 & 16CR026264) OPINION

APPEAL from the Superior Court of San Bernardino County. R. Glenn Yabuno, Judge. Affirmed in part; reversed in part with directions.

Mark D. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles Ragland, Scott Taylor and Brendon W. Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

FACTUAL AND PROCEDURAL HISTORY

A. PROCEDURAL HISTORY

On July 14, 2015, in case No. FSB1501232, a 16-count amended felony complaint charged defendant and appellant Lamont Terrell Arnold with solicitation of murder (Pen. Code, § 653f, subd. (b); count 1); possession of phencyclidine for sale (Health & Saf. Code, § 11378.5; counts 2, 4, 9, 10, 15); conspiracy to possess phencyclidine for sale (Pen. Code, § 182, subd. (a)(1); counts 3, 6, 8, 12, 13, 16); manufacturing phencyclidine (Health & Saf. Code, § 11379.6, subd. (a); count 5); conspiracy to possess cocaine base for sale (Pen. Code, § 182, subd. (a)(1); count 7); conspiracy to possess a controlled substance for sale (Pen. Code, § 182, subd. (a) (1); count 11); and sale of phencyclidine (Health & Saf. Code, § 11379.5, subd. (a); count 14). The amended complaint also alleged that defendant committed all of the charged offenses for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members (Pen. Code, § 186.22, subd. (b)(1)(A)); that he had served three prior prison terms (Pen. Code, § 667.5, subd. (b)); and that he had three prior drug sale convictions (Health & Saf. Code, § 11370.2, subd. (a)).

On June 1, 2016, defendant entered into a plea agreement in which he pled guilty to all counts except count 5 (manufacturing phencyclidine), and admitted all of the sentence enhancement allegations. As agreed, the trial court sentenced defendant to prison for 58 years eight months, and released defendant on his own recognizance pursuant to a waiver under *People v. Vargas* (1990) 223 Cal.App.3d 1107 (*Vargas*

waiver). If defendant returned to court on June 6, 2016, without violating any laws while out of custody, defendant's sentence would be reduced to 15 years eight months. On June 6, 2016, defendant returned to court and the trial court resentenced defendant to 15 years, instead of the agreed-upon 15 years eight months pursuant to the plea agreement.

On July 19, 2017, in case No. 16CR026264, the People amended the felony complaint to add one count of assault with force likely to produce great bodily injury under Penal Code section 245, subdivision (a)(4) (count 4). That same day, pursuant to a plea agreement, defendant admitted that he violated his *Vargas* waiver in case No. FSB1501232 and pled guilty to counts 1 and 4 in case No. 16CR026264. In exchange for the plea and admission, defendant received a concurrent three-year prison sentence in case No. 16CR026264. In case No. FSB1501232, the trial court resentenced defendant to state prison for 53 years four months.

On August 23, 2017, defendant filed notices of appeal in both cases, and a second notice of appeal in case No. FSB1501232 on August 31, 2017. The trial court granted defendant's requests for a certificate of probable cause in both cases.

On January 8, 2018, defendant filed a request for judicial notice for this court to take judicial notice of two applications of extension of time to file a brief with this court, and communications between counsel and a superior court appeals clerk to explain the belated issuance of an abstract of judgment. On January 17, 2018, the People filed an opposition to the request for judicial notice. On January 25, 2018, we reserved the ruling on the request for judicial notice for consideration with the appeal. The People argue that the motion should be denied because defense counsel is essentially asking us to take

judicial notice of the truth of what he heard from the superior court clerk, that "the trial court issued an abstract of judgment only as a result of appellate counsel's contacts with the superior clerk." We hereby grant defendant's request to take judicial notice of the applications for extension of time to file brief (exhibits A & B attached to the request for judicial notice) as they are both documents that have been filed in this case. We, however, deny defendant's request for judicial notice of what was told by the superior court appeals clerk to defense counsel regarding the issuance of an abstract of judgment.

B. FACTUAL HISTORY[1]

Between February 24, 2015, and March 23, 2015, defendant possessed controlled substances for sale, sold a controlled substance, and solicited the murder of Addarion Barron. After being sentenced, defendant was released on his own recognizance so he could attend his daughter's graduation; defendant surrendered himself five days later. After defendant was taken into custody, jail personnel located numerous bundles of narcotics in defendant's rectum.

DISCUSSION

A. THE TRIAL COURT LACKED JURISDICTION TO RESENTENCE DEFENDANT

Defendant contends that the trial court lacked jurisdiction to recall his 15-year prison sentence and resentence him to 53 years four months in state prison because, by the time the trial court recalled the sentence, the sentence had been executed and the trial

[1] The parties have stipulated that the police reports and defendant's rap sheet would constitute the factual basis of his guilty pleas.

court no longer had jurisdiction. The People concede that "the trial court did not have jurisdiction to recall [defendant's] 15-year sentence because the sentence had been executed before the trial court recalled it." The People, however, contend that the "trial court was entitled to avail itself of an equitable remedy—recalling the 15-year sentence and resentencing appellant" because defendant "obtained the 15-year sentence as a result of fraud on the court." For the reasons set forth below, we agree with both parties that the trial court lacked jurisdiction to recall defendant's 15-year sentence. We disagree with the People that the trial court was able to recall the sentence on equitable grounds. We, therefore, reverse the trial court's recall order.

On June 1, 2016, the trial court imposed the first sentence in case No. FSB1501232. Pursuant to the agreement of the parties, the sentence would be recalled and defendant would receive a lesser sentence if he complied with certain conditions prior to resentencing, which was scheduled for June 6, 2016.

During the hearing, the trial court stated: "My understanding of this agreement, sir, is that I will be sentencing you today to 58 years and four months in State Prison on all of the counts as alleged. So your sentence will actually occur today. [¶] . . . [¶] You will return on Monday, June 6th, at 8:30 to this courtroom. If you return on that day, at that time, and you have suffered no violation of your release agreement, then you will be resentenced to 15 years and eight months in State prison. [¶] . . . [¶] Do you understand that if you do not come back as scheduled, or you commit any violations of this agreement, including associating with gang members . . . during the time that you're out,

or committing any new offenses, that you will be sentenced to 58 years and four months in State prison."

The court went on to state that pursuant to the *Vargas* waiver, defendant would be released from custody, but he was to return for resentencing on June 6. The court asked defendant: "You understand the terms of your *Vargas* release, sir, as outlined by me and as outlined in your plea agreement? [¶] . . . [¶] Do you understand that if you violate any of the terms of the plea agreement, or any of the orders I just made, that you will be sentenced to 58 years and four months in State Prison?" Defendant replied, "[y]es."

On June 6, 2016, defendant appeared as promised. The court sentenced defendant to 15 years in state prison.[2] Thereafter, defense counsel requested that defendant be referred to Fire Camp because "[h]e would be a good Fire Camp candidate." The court responded, "[a]s you know, I can't direct any issue, but I will leave it up to the Department of Corrections to make whatever determination they feel appropriate."

Eight days later, on June 14, 2016, defendant was arraigned on the complaint filed in case No. 16CR026264, which alleged that on June 6, 2016, defendant had possessed controlled substances for sale—six packages of narcotics in his rectum. These packages were discovered shortly after defendant was taken into custody, immediately after resentencing. After defendant entered pleas of not guilty, the trial court stated:

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[2] The 15-year sentence is slightly less than the agreed-upon sentence in the plea agreement. The People, however, did not object to the sentence or file a notice of appeal. This issue, therefore, is not before us. (*People v. James* (1985) 170 Cal.App.3d 164, 167.)

"Not guilty pleas are entered, denial of special allegations are entered. The Court, at this time, will recall its previous sentence in Case No. FSB1501232. Set the matter for further sentencing also on 6/22."

On July 19, 2017, the People amended the felony complaint in case No. 16CR026264 to add one count of assault with force likely to produce great bodily injury under section 245, subdivision (a)(4), for al alleged act that occurred after defendant was taken into custody. That same day, pursuant to a plea agreement, defendant admitted that he violated his *Vargas* waiver in case No. FSB1501232 by being in possession of narcotics, and pled guilty in case No. 16CR026264 to counts 1 and 4. In exchange, defendant received a three-year prison sentence, to be served concurrently to the sentence in his original case. In the original case, the court resentenced defendant to state prison for 53 years four months.

" 'Under the general common law rule, a trial court is deprived of jurisdiction to resentence a criminal defendant once execution of the sentence has commenced.' " (*People v. Amaya* (2015) 239 Cal.App.4th 379, 384, quoting *People v. Karaman* (1992) 4 Cal.4th 335, 344.) Execution of the sentence begins when a copy of the minute order or abstract of judgment is delivered to the local sheriff. (*People v. Garcia* (1995) 32 Cal.App.4th 1756, 1767.)

In this case, immediately after defendant was sentenced to 15 years in state prison, the sentence was recorded in the minutes and defendant was "remanded to the Custody of the Sheriff to be transported to State Prison." This minute order, therefore, constituted execution of defendant's 15-year prison sentence. Therefore, the People concede that

"the trial court lacked jurisdiction to recall appellant's 15-year sentence a week later. (*People v. Karaman*, *supra*, 4 Cal.4th at pp. 344-345; *People v. Garcia*, *supra*, 32 Cal.App.4th at p. 1767; *People v. Kirkpatrick* (1991) 1 Cal.App.4th 538; accord, *People v. Tindall* (2000) 24 Cal.4th 767, 776, fn. 6.)"

Although the People concede that the trial court lacked jurisdiction to recall defendant's sentence, the People argue that the court had equitable powers to recall defendant's sentence because defendant committed a "fraud on the court" by possessing drugs for sale while he was being sentenced. We disagree.

In support of that position, the People rely on *People v. Malveaux* (1996) 50 Cal.App.4th 1425. In *Malveaux*, the defendant argued that double jeopardy prohibited him from being retried as an adult for an offense that he had previously been tried for as a juvenile. The court of appeal provided that "[t]he perpetration of fraud on the court *must be affirmative actions* taken on the part of the defendant." (*Id.* at p. 1441.) Moreover, "[i]f a defendant, . . . intentionally commits a fraud upon the court by providing the court with erroneous information that the court relies upon, . . . he certainly must bear the consequences of his fraudulent and deceitful actions." (*Ibid.*) Thereafter, the court found that the defendant had committed a fraud on the juvenile court by misrepresenting his birthdate and age to the juvenile court. The court stated that the "record amply documents appellant's **affirmative** representations to the juvenile department that he was born November 9, 1974, when he well knew he was born *eight years* earlier. Thus, this is not a case where the juvenile court erroneously assumed a youthful looking person haled into that court was a minor when he actually was an adult. Rather, it is a case where an

accused **affirmatively misstated** his true age in an attempt to be treated as a juvenile offender rather than an adult criminal defendant. That is a clear 'fraud on the court.' " (*Id.*at p. 1443, boldface added.)

The facts in this case are different. In this case, defendant appeared for the sentencing hearing, the following exchange ensued:

"THE COURT: . . . Good morning, sir.

"THE DEFENDANT: Good morning. How are you doing?

"THE COURT: Good, sir. Hope everything went well. [Referring to the graduation defendant attended while he was released.]

"THE DEFENDANT: It did. I had a blessed day, man.

"THE COURT: Good."

The court, defense counsel and the prosecutor then discussed the proper sentencing pursuant to the terms of the plea agreement. Defendant made no other statements during this discussion. After the trial court imposed defendant's sentence, defendant stated, "Make sure it's half time, right?" And the court responded, "Yes, sir. Good luck to you sir." During the sentencing hearing, neither defendant nor his counsel mentioned anything about the *Vargas* agreement or whether defendant had engaged in criminal activity while released.

The People also rely on *People v. Kirkpatrick*, *supra*, 1 Cal.App.4th at pages 541 through 542. In *Kirkpatrick*, the defendant misrepresented to the trial court that he had been awarded the Silver Star, a high military distinction, and the court relied on this misrepresentation in imposing the middle term of the defendant's offense. After the

sentence had been entered in the minutes of the court and the defendant the defendant had filed a notice of appeal, the trial court discovered the falsehood of the defendant's claim, and resentenced him to the upper term. (*Ibid.*) The appellate court concluded that the entry of the original sentence in the court minutes eliminated the trial court's authority to modify the sentence, and removed the trial court's jurisdiction over the matter. (*Id.* at pp. 543-545.) The court, however, refused to find extrinsic fraud on the court because the prosecutor was aware at the time of the sentencing that the defendant did not receive a Silver Star, and could have raised the issue earlier. (*Id.* at pp. 544-545.)

Unlike the defendants in *Malveaux* (who affirmatively misrepresented to the juvenile court so as to be treated as a juvenile offender) and *Kirkpatrick* (who affirmatively misrepresented being awarded a Silver Star), defendant, in this case, made no affirmative misrepresentation to the court. The court never asked defendant if he had been law abiding, and defendant never affirmatively stated that he had been law abiding. The People even recognize "that unlike in *Malveaux* and *Kirkpatrick*, [defendant] did not expressly misrepresent to the trial court that he had not violated the law while out of custody." Based on the record in this case and the People's concession, we reject the People's proposition that defendant committed affirmative fraud upon the trial court. Therefore, the trial court lacked jurisdiction to resentence defendant.

The People then contend that "the trial court was not permitted to avail itself of an equitable remedy, the matter should be remanded to the trial court with directions to reinstate the 15-year sentence in case FSB1501232 and permit the prosecutor to withdraw from the plea agreement in case 16CR026264. (*People v. Collins* (1978) 21 Cal.3d 208,

215 [finding that if People deprived of benefit of bargain as a result of successful defense appeal, prosecutor may withdraw from plea agreement and reinstate any dismissed charges].)" We disagree.

In this case, pursuant to a plea agreement in case No. 16CR026264, defendant pled guilty to two offenses in exchange for a dismissal of the two other drug offenses, and stipulated to a three-year state prison sentence concurrent *to whatever new sentence was to be imposed* in case No. FSB1501232. In fact, the plea form provides only that defendant is entering the plea because the prosecutor "has agreed to: 3 year S[tate] P[rison] concurrent to FSB-1501232." The plea form contains no agreement regarding the sentence in case No. FSB1501232.

Moreover, the reporter's transcript of the entry of the plea supports the conclusion that the prosecutor bargained only to have defendant enter a plea in the new case. Prior to the entry of the plea, defense counsel explained how he had described the plea agreement to defendant. Defense counsel stated, "I told him that the deal was that the prosecutor offered him was if he pled to that 245, it would be concurrent." There was no mention of a specific sentence to be imposed in the prior case.

Therefore, the terms of the plea agreement were simply that defendant would receive a specified concurrent sentence if he pled to the new assault charge; there was nothing in the agreement in case No. 16CR026264 that included a specific sentence for case No. FSB1501232. Therefore, a specified sentence in case No. FSB1501232 was not part of the bargain for case No. 16CR026264. Therefore, the prosecutor shall not be permitted to withdraw from the plea in case No. 16CR026264.

B. THE TERMS IMPOSED UNDER HEALTH AND SAFETY CODE SECTION 11370.2 ARE VACATED

Defendant contends that that recently enacted Senate Bill 180, which amends Health and Safety Code section 11370.2 (section 11370.2), should be applied retroactively, and enhancements for his three prior convictions under Health and Safety Code section 11361.5 should be stricken; the People agree. We agree with defendant and the People and will direct the trial court to modify defendant's sentence.

At the time of defendant's sentencing, section 11370.2 provided for sentencing enhancements for certain drug-related offenses if a defendant had a prior conviction for specified drug-related crimes. Therefore, defendant's sentence included three 3-year terms imposed under section 11370.2 for prior convictions under section 11351.5. Under the amended statute, section 11351.5 is no longer a qualifying prior offense.

In his brief, citing *In re Estrada* (1965) 63 Cal.2d 740 and its progeny, defendant asks this court to retroactively apply the amendments to section 11370.2, and to strike his three three-year sentencing enhancements. The People concede that these recent legislative amendments govern this case and apply retroactively. Recently, in *People v. Milan* (2018) 20 Cal.App.5th 450, a court concluded that the legislative amendments to section 11370.2 applied retroactively and directed the trial court to strike the defendant's sentencing enhancement. (*Milan*, at pp. 455-456.) We agree with *Millan*'s reasoning and result, and find its holding applicable to the circumstances here. Accordingly, we accept the concession of the People and remand the matter to the trial court with instructions to

strike the three three-year enhancements under section 11370.2, and resentence defendant.

DISPOSITION

In case No. FSB1501232, the trial court lacked jurisdiction to recall defendant's 15-year prison sentence and resentence him to 53 years four months in state prison. Moreover, the three Health and Safety Code section 11370.2 enhancements imposed in case No. FSB1501232 are vacated. Therefore, the case is remanded to the trial court with directions for the court to: (1) to vacate its order recalling the sentence in case No. FSB1501243 and to reinstate its original sentence of 15 years; and (2) to strike the three Health and Safety code section 11370.2 enhancements in case No. FSG1501232. In all other respects, the judgment is affirmed.

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MILLER
Acting P. J.

We concur:

CODRINGTON
J.

RAPHAEL
J.